specific performance. The only defence to such a suit would be fraud or collusion. There is no proof here that the valuers did not value the property as fairly as they could; there is no suggestion of fraud or collusion. There must, therefore, be a decree for specific performance of the contract with costs."

The test laid down in *Collier* v. *Mason* was cited with approval by the Court of Appeal in *Dean* v. *Prince*.[4] That was a case in which the articles of association of a private company provided that a deceased director's shares could be purchased by the surviving directors at a price to be certified by an auditor as a fair value. A director who held a controlling interest in the company died. The auditor, having made a certified valuation, stated in writing that for the purpose of his valuation he had not regarded the company as a going concern but that he had valued on "a break-up" basis, because in his opinion the shares had no value on any other basis, having regard to the losses made by the company. At the trial before Harman J. a preliminary point was taken on the part of the defendants that the valuation was unchallengable in the courts since the shareholders had by the articles submitted the matter in question to the exclusive arbitriment of the auditor. The learned judge disallowed this objection on the ground that by stating the reasons which had led him to arrive at his valuation, Mr. Jenkinson had exposed his certificate to examination by the courts into the validity of such reasons. There was no appeal from that part of the learned judge's judgment. The judge then proceeded to consider the basis of Mr. Jenkinson's valuation, and concluded in favour of the plaintiff that he, Mr. Jenkinson, had fallen into an error on a matter of principle or had made a material mistake in arriving at his figure, and so declared that the plaintiff was not bound by the certificate.

It was against that part of the learned judge's judgment that the defendants appealed. The Court of Appeal held that a valuation could be impeached, not only for fraud but also for mistake or miscarriage of justice, e.g., if the expert made an arithmetical error or took something into account which he ought not to have taken into account or vice versa, or interpreted the agreement wrongly, or proceeded on some erroneous principle; even if the court could not be bound to actual error, nevertheless if the figure itself was so extravagantly large or so inadequately small that the only conclusion was that the expert must have made some error, the court would interfere; but, on the facts, bearing in mind particularly the precarious nature of the company's tenure of its premises, it could not be said that the auditor had erred, and, therefore, his valuation ought not to be disturbed. In other words, it was held that the auditor had correctly rejected the "going-concern" basis of valuation, as the company had no expectation of profit making.

The dictum of Harman J. in *Dean* v. *Prince*[5] was not followed in *Smith* v. *Gale*[6] in which it was held that the accountant's certificate, having been founded on a mistaken interpretation of the agreement, was not binding on the plaintiff and the court had jurisdiction to go behind the certificate and correct the value shown therein. In *Jones (M)* v. *Jones R.R.*[7] Ungoed Thomas J. said that where a valuation is made on an erroneous principle, the valuation is vitiated and cannot be relied on even though it is not shown that the resultant valuation figure is wrong. That was a case in which the shares in the company and the assets were to be valued "as between a willing vendor and a willing purchaser of a business being carried on as a going concern," the valuation of the shares being directed to be made on "an assets basis."

In the present case Price Waterhouse did not state in their valuation report the reasons which had led them to arrive at their valuation. There were no directions to them as to whether they were to value the shares on a going-concern basis or on the basis of a break-up valuation. There was nothing to suggest on what basis Robert Lim, Kwang & Co. arrived at their very much higher valuation of the shares. The order appointing Price Waterhouse directed that all the relevant accounts and books of the company were to be made available to them. This was done, and quite clearly their valuation was based on all the accounts, the accuracy of which had never been challenged by the appellant.

In all the circumstances of the case we could find no justification to go behind the valuation report or allow any further inquiries to be made as to the correctness or otherwise of such valuation. We therefore dismissed the appeal with costs.

Appeal dismissed.

Solicitors: *Chin, Sethu & Co.; S. Y. Chan & Co.*

SUNGAI WANGI ESTATE v. UNI

[O.C.J. (Eusoffe Abdoolcader J.) February 3, 1975]
[Ipoh — Originating Summons No. 71 of 1974]

Administrative Law — Award of Industrial Court — Error on the face of the record — Decision voidable — Application for declaration — Whether court can make order — Whether proceedings properly brought by originating summons — Misconduct of worker — Whether there has been condonation — R.H.C., 1957, O. 25 r. 5 and O. 54A r. 1 — Industrial Relations Act, 1967, s. 29(3).

In this case the facts were that the manager of the Sungai Wangi Estate had received certain complaints against the respondent but it appeared that after interviewing him he was convinced that the respondent was innocent and the respondent was merely transferred to another post. Subsequently further complaints were received against the respondent and an inquiry was instituted and eventually the respondent was dismissed. The matter was referred to the Industrial Court by the Minister and the Industrial Court decided that there had been condonation by the applicant against the respondent. The applicant applied by originating summons for a declaration that there was an error on the face of the record of the Industrial Court and that the award was invalid.

Held: (1) the court was precluded from making the declaration sought for mere error of law on the face of the record which did not result in any jurisdictional defect so as to make the award of the Industrial Court a nullity;

(2) where there was an error on the face of the record the correct and appropriate procedure would in the circumstances have been an application for an order of *certiorari* to quash the award;

(3) as no question of construction arose in this case, the proceedings should have been brought in the form of an action commenced by writ and not by originating summons.

Cases referred to:-

(1) *Industrial Arbitration Tribunal* v. *Cargo Handling Corporation Ltd.* [1967] 2 M.L.J. 98.

(2) *In the matter of Cargo Handling Corporation Ltd.* v. *Cargo Handling Corporation Staff Union* [1966] 2 M.L.J. 278.

(3) *Selangor Omnibus Company Ltd.* v. *Transport Workers Union, Malaya* [1967] 1 M.L.J. 280.

(4) *Lian Yit Engineering Sdn. Bhd.* v. *Loh Ah Fon & Ors.* [1974] 2 M.L.J. 41.

(5) *Ridge* v. *Baldwin* [1964] A.C. 40.

(6) *Anisminic Ltd.* v. *Foreign Compensation Committee* [1969] 2 A.C. 147.

(7) *Taylor* v. *National Assistance Board* [1956] P. 470.

(8) *In re Birkenhead Corporation* [1952] Ch. 359.

(9) *Lee* v. *The Showmen's Guild of Great Britain* [1952] 2 Q.B. 329, 346.

(10) *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1958] 1 Q.B. 554, 558.

(11) *Barnard & Ors.* v. *National Dock Labour Board & Ors.* [1953] 2 Q.B. 18, 41.

(12) *Healey* v. *Minister of Health* [1955] 1 Q.B. 221.

(13) *Rex* v. *Northumberland Compensation Appeal Tribunal; Ex parte Shaw* [1952] 1 K.B. 338.

(14) *Punton* v. *Ministry of Pensions and National Insurance (No. 1)* [1963] 1 W.L.R. 186.

(15) *Punton* v. *Ministry of Pensions and National Insurance (No. 2)* [1964] 1 W.L.R. 226.

(16) *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1960] A.C. 260.

(17) *Queen* v. *Justices of Central Criminal Court* (1886) 17 Q.B.D. 598, 602.

(18) *Philip Hoalim Jr. & Anor.* v. *State Commissioner, Penang* [1974] 2 M.L.J. 100, 103.

(19) *Jaundoo* v. *Attorney General of Guyana* [1971] A.C. 972.

(20) *Augehrn & Piel* v. *Federal Cold Storage Co.* Transvaal L.R. [1908] T.S. 761.

(21) *Federal Supply and Cold Storage Co.* v. *Augehrn* (1910) 103 L.T. 150.

ORIGINATING SUMMONS.

D. Puthucheary for the applicant.

D. P. Xavier for the respondent.

Eusoffe Abdoolcader J.: Sungai Wangi Estate seeks in an application by way of originating summons for a declaration that there is an error on the face of the record of Industrial Court Award No. 1/74 in Industrial Court Case No. 20 of 1973, a declaration that the award is invalid because of the error of law on the face of the record and such further or other relief as the court may think fit and proper, concluding not unnaturally with the ubiquitous prayer for costs. This application raises in my view a very important issue in administrative law pertaining to the role of the declaratory judgment in judicial review.

Briefly, the background of this matter is that on 18th January 1973 the applicant dismissed the respondent by giving him one month's salary in lieu of notice, whereupon the respondent appealed to the Minister under section 16A of the Industrial Relations Act, 1967, and on 14th June, 1973, the Minister referred the matter to the Industrial Court. On 7th January, 1974, the President of the Industrial Court handed down the Award No. 1/74.

Before Mr. Puthucheary, counsel for the applicant, could proceed to the substance of the complaint against the award, I raised at the very outset of the hearing before me some 10 days ago the question of the propriety of the form and nature of the proceedings before me and the consequence of any declaration I may make thereupon in that it appeared to me there would then be two inconsistent decisions, one of the Industrial Court and the other of this court, subsisting side by side. Mr. Xavier, counsel for the respondent, frankly admitted that he had not considered this aspect and had not proposed to raise it but was going straight into the meat of the matter, as he put it, but, as I pointed out to him, I could hardly consider the meat if, metaphorically speaking, it comes from the wrong shop or, perhaps more appropriately, is the product of illegal slaughter, referring of course to the form and nature of the proceedings before me.

Mr. Puthucheary conceded that certiorari would lie in this case but stated that the reason for seeking a declaration and not certiorari was that the Industrial Court does not have a corporate personality and therefore it would not be possible to join it as a party to any proceedings for certiorari to quash the award. He relied on *Industrial Arbitration Tribunal* v. *Cargo Handling Corporation Ltd.*,[1] but I cannot see how that case has any relevance whatsoever as it only decided that the Industrial Arbitration Tribunal has no corporate personality and therefore no *locus standi* as such to be the appellant against an order of prohibition made by Gill J., (as he then was) in *In the matter of Cargo Handling Corporation Ltd.* v. *Cargo Handling Corporation Staff Union*[2] where in fact an order of prohibition was made against the Industrial Arbitration Tribunal. It is now settled law that notwithstanding the finality clause enacted in section 29(3)(a) of the Industrial Relations Act, 1967, this court has power to issue an order of certiorari to quash the Industrial Court's decision which on the face of it discloses an error of law (*Selangor Omnibus Company Limited* v. *Transport Workers Union, Malaya*;[3] *Lian Yit Engineering Sdn. Bhd.* v. *Loh Ah Fon & Others*[4]). There is therefore no reason why an order of certiorari could not have been sought in this matter.

But the question still remains as to whether or not as an alternative to certiorari a declaration can be made for the purposes sought. Certiorari will lie to quash a decision for want or excess of jurisdiction, breach of the rules of natural justice, error of law on the face of the record and fraud or collusion. There is now ample authority demonstrating that a declaration of invalidity is obtainable for jurisdictional defects and breaches of natural justice, in such cases as, for example, where an interested party has not been joined or heard, resulting in a decision or determination being a nullity (*Ridge* v. *Baldwin*[5]). The position however seems to be somewhat different where the only defect is an error of law on the face of the record not going to jurisdiction. Such a decision is voidable and not void and logically a voidable decision cannot be declared invalid, as such a declaration will not state that the decision never had any effect but rather that it is ineffective as from the date of the declaration. It will accordingly result in only creating a new legal situation and not proclaiming the existence of one, just as certiorari to quash does in such cases. To put it differently, it will be constitutive and not merely declaratory.

It may well be that the distinction between void and voidable decisions has been somewhat narrowed by the very wide concept of excess of jurisdiction adopted by the House of Lords in *Anisminic Ltd.* v. *Foreign Compensation Commission*[6] where the members of the House of Lords emphatically repudiated the idea that the jurisdiction of an inferior tribunal was determinable only at the outset of its inquiry and observed (albeit strictly obiter) that a tribunal having jurisdiction over a matter in the first instance might exceed its jurisdiction by breaking the rules of natural justice, applying a wrong legal test and answering the wrong question, (*ibid.* at pages 147, 171, 195, 207, 215), failing to take relevant considerations into account or basing the decision on legally irrelevant considerations (*ibid.* at pages 171, 195, 198, 215). Although they accepted the survival of the rule that a judicial tribunal has power to err within the limits of its jurisdiction, it is not easy to identify errors of law which, in the light of their analyses, would not be held to go to jurisdiction. I would however point out immediately that this aspect does not arise for consideration in this matter as the case for the applicant was not presented on the basis of a jurisdictional issue in that in effect a jurisdictional defect arose as the result of an error of law on the face of the record resulting in the award being a nullity; I do not think that the applicant would in any event necessarily succeed even if its case had been so presented as it would then be relying almost wholly on dicta for the very wide concept of excess of jurisdiction adopted by the House of Lords in the *Anisminic* case, *supra.* Counsel for the applicant clearly conceded that the award of the Industrial Court would only be voidable as a result of an error of law on the face of the record and not void.

There is, however, an equivocal exception in the case of *Taylor* v. *National Assistance Board*[7] which seems to show that a declaration may be made even though the decision challenged is only wrong in law. The plaintiff, a wife respondent in a divorce suit, was offered by the defendant Board a civil aid certificate, to enable her to defend that suit, on certain terms as to the contribution she was required to make. She alleged that the defendants, in assessing her disposable income for the purpose of calculating this contribution, wrongly took a certain factor into account, and she instituted proceedings for a declaration to that effect. The decision of the Board, it seems clear, was not in excess of jurisdiction; it was only alleged to be erroneous in law. It was objected by the defendants that certiorari would have been the appropriate remedy and that that was the only proper way of challenging their decision. Lord Merriman P., assuming that certiorari was available, overruled this objection and made the declaration asked for. On appeal his decision was reversed on the merits of the case and the question of the court's power to make a declaration in such circumstances was not pursued before the Court of Appeal or the House of Lords, but Denning L.J., (as he then was) however did comment in his judgment in the Court of Appeal that he entirely agreed with Lord Merriman that the remedy by declaration was available at the present day so as to ensure that a board or other authority set up by Parliament made its determination in accordance with the law, and this was so no matter whether the determinations were judicial, disciplinary or administrative.

I referred to the decision in *Taylor* v. *National Assistance Board, supra,* as equivocal for the reason that not only does it stand by itself (apart from only dicta in certain other cases which I shall adumberate) but also because the National Assistance Board there had powers of amendment and it is further pertinent to refer to the following passage in Lord Merriman's judgment in dealing with the objections raised by the defendants to the remedy sought by way of declaration (*ibid.* at page 495):

"Though it would be wrong to suggest that the point was abandoned, I did not receive the impression that it was pressed with much fervour or confidence. Indeed, Mr. Winn joined the other counsel in the case in expressing the hope that I would determine the question.

This is a consideration to which, on the authority of Lord Evershed, M.R., in *Bagettes Ltd.* v. *G.P. Estates* [1956] Ch. 290, I am entitled to pay attention.

For these reasons I overrule the objection."

However *In re Birkenhead Corporation*[8] was not cited in *Taylor* v. *National Assistance Board, supra,* and it is not easy to reconcile the two cases. In *In re Birkenhead Corporation, supra,* the court held that a decision having been made by the National Arbitration Tribunal having jurisdiction to do so, the matter was *res judicata* and therefore could not be redetermined by the court on originating summons. The two cases might just conceivably be distinguished on the assumption that the issue decided by the National Assistance Board in *Taylor's* case, *supra,* was not *res judicata,* but I really cannot see any force or merit in any such contention.

Lord Denning M.R., has taken a very wide view of the use of the declaration and on a number of occasions has stated, *obiter,* that a declaration will lie to correct any error of law made by inferior tribunals whether or not the error is jurisdictional and whether or not it appears on the face of the record: (*Lee* v. *The Showmen's Guild of Great Britain*[9]; *Pyx Granite Co. Limited* v. *Ministry of Housing and Local Government*[10] *Taylor* v. *National Assistance Board, supra; Barnard and Others* v. *National Dock Labour Board and Others*[11]). But in *Healey* v. *Minister of Health*[12], a Court of Appeal consisting of Denning, Morris and Parker L.JJ., held that it had no jurisdiction to impugn by declaration a decision of a Minister made within his jurisdiction. Each member of the court emphasised that in order to decide the claim for a declaration, they would need to rehear the very matter which the Minister had decided. This would be usurping an appellate jurisdiction which the court had not been given by Parliament and which it could not create. Denning L.J., (as he then was) also said:

"And suppose the court did rehear the matter and decide in Mr. Healey's favour, and grant the declaration for which he asks, what would happen to the Minister's decision? So far as I can see, it would still stand unless the Minister chose of his own free will to revoke it. There would then be two inconsistent findings, one by the Minister and the other by the court. That would be a most undesirable state of affairs." (*ibid.* at page 228).

However, he later added that if the Minister's decision had disclosed an error of law on its face (which it

did not), the court can "review it by the procedure laid down in *Rex* v. *Northumberland Compensation Appeal Tribunal; Ex parte Shaw*,[13] or, alternatively, by a declaration." (*ibid.* at pages 228-9). He did not explain how this use of a declaration would overcome his earlier objection to the "two inconsistent findings". It would appear to me that there is no reason of principle for contending that the decision of the court on the question of its jurisdiction to entertain the action ought to have been different if the plaintiff in that case had in fact pleaded that the Minister's determination was wrong in law.

In *Punton* v. *Ministry of Pensions and National Insurance (No. 1)*[14], what happened was that the National Insurance Commissioner had made a determination that the applicants, as "persons interested" in an industrial dispute, were not entitled to unemployment benefit. They took out an originating summons asking the court (1) to determine whether they were "persons interested" and (2) to declare that they were entitled to the benefit. The Court of Appeal held that the first question had been improperly framed. The summons was therefore amended so as to ask the court to determine whether the Commissioner's decision, on the facts found by him, was right in law. A differently constituted Court of Appeal in *Punton* v. *Ministry of Pensions and National Insurance (No. 2)*[15] held that the court still had no jurisdiction to answer the question. Even if the Commissioner had been wrong in law, his determination would still have been binding until it was invalidated or revoked; it was not asserted to be invalid and the Commissioner had no power to rescind his decision or substitute a new one; no benefit could therefore become payable in consequence of a declaration made by the court to the effect that the determination was wrong in law. The result of *Punton (No. 2), supra*, would seem to be that the court has jurisdiction to grant a declaration only where the decision which is being impugned is without jurisdiction and therefore void, but not where it is within jurisdiction and therefore valid, even if voidable.

In *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government*,[16] the House of Lords decided that the courts have jurisdiction to grant declarations invalidating a Minister's decision to refuse planning permission under the Town and County Planning Act, 1947; but the plaintiffs in that case did not contend that the Minister's decisions were merely wrong but that they were invalid as the matter had already been decided by Parliament. The House of Lords, in accepting this contention, indicated that the Minister had no authority in the matter and that his determination was not merely erroneous but invalid for want of authority.

A judicial determination may be valid and binding even though erroneous in law or fact; that is to say, provided that the decision was made within jurisdiction, it will have legal efficacy for all purposes until set aside on an appeal or in the exercise of the supervisory jurisdiction of the courts, and it will be immune from collateral or indirect challenge (for example, in enforcement proceedings, or in declaratory proceedings purporting to redetermine the same issue (*Healey* v. *Minister of Health, supra; Punton* v. *Ministry of Pensions and National Insurance (No. 2), supra*, or in an action for a civil wrong). It can also be designated as *res judicata* (*In re Birkenhead Corporation, supra*). As was said in *Queen* v. *Justices of Central Criminal Court*: [17]

> "Where a court has jurisdiction to entertain an application. it does not lose its jurisdiction by coming to a wrong conclusion, whether it was wrong in law or in fact."

A distinction ought to be made between declarations seeking to prevent future action (prospective declarations) and those impugning past decisions (retrospective declarations). Prospective declarations do not raise any question as to the validity of decisions or determinations; the court is merely asked to declare that a certain course of action which is being contemplated is illegal. The courts in these cases exercise a preventive supervision akin to that administered through injunctions and prohibitions. On the other hand, when a retrospective declaration is sought, the inevitable question of validity and all its corollaries arises. Has the court jurisdiction to grant a declaration only with regard to null decisions which are being challenged, or to put it differently, is the declaratory judgment merely declaratory or can it be used, despite its name, to invalidate an otherwise valid decision? The answer seems to be rather self-evident since the declaratory judgment is by definition merely declaratory and therefore can be granted only where the court is satisfied that the decision impugned is nugatory, a mere nullity which could in any way be disregarded. Thus it would appear that the only jurisdiction which the court is deemed to have is founded upon the invalidity of the challenged decision, and such jurisdiction is excluded where that decision 'still stands'. In other words, the court can grant a declaration only where a decision which has been impugned is without jurisdiction and void, but not where it is within jurisdiction and merely voidable.

It would therefore appear to me to be clear on the authorities which I have discussed and notwithstanding the equivocal decision in *Taylor* v. *National Assistance Board, supra*, that I am precluded from making the declaration sought for mere error of law on the face of the record which does not result in any jurisdictional defect so as to make the award of the Industrial Court a nullity. The correct and appropriate procedure would in the circumstances have been an application for an order of certiorari to quash the award, and in my view certiorari would indeed have been the only remedy available to the applicant.

Mr. Puthucheary for the applicant relied on the observations of Denning L.J., (as he then was) in *Barnard and Others* v. *National Dock Labour Board and Others, supra*, (at page 41). The proposition expounded in that case to the effect that in proper cases where persons would otherwise be without a remedy for an injustice, the court had a discretionary power to intervene by way of declaration and injunction in the decisions of statutory tribunals, must in my view be considered in relation to the facts of that case where it was in fact held that the original notices of suspension were a nullity and the decisions of the appeal tribunal based on them were equally a nullity, and accordingly the observations referred to were otherwise only *obiter*.

Mr. Puthucheary also made the point that a declaration made under section 41 of the Specific Relief Act, 1950, was binding only on the parties to the suit by virtue of the provisions of section 42 of the Act, and that the only method of enforcing the award of the Industrial Court was by way of complaint by one of the parties to the Minister for non-compliance under section 53 of the Industrial Relations Act, 1967. He contended that neither the Industrial Court nor the Minister could *per se* enforce the award, and as a declaration of invalidity would be binding on the respondent, he would not be in a position to complain if as a result thereof he was dismissed. I cannot see any merit in his contention in view of the law and authorities which I have considered as the difficulty would still remain in the matter of two extant but conflicting decisions subsisting simultaneously. Moreover, the proviso to section 41 of the Specific Relief Act enacts that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration, omits to do so. Certiorari was available within the prescribed time to the applicant but it chose to proceed by way of an application for a declaration of invalidity which would not have the effect of nullifying and quashing the award of the Industrial Court.

The finality clause enacted in section 29(3)(a) of the Industrial Relations Act to the effect that an award of the Industrial Court shall be final and conclusive and no award shall be challenged, appealed against, reviewed, quashed or called in question in any court of law has already been breached by the doctrine of judicial review and accordingly decisions of the Industrial Court are in fact open to review when so warranted. To extend however the doctrine of judicial review by making further inroads into the provisions of section 29(3)(a) of the Act in the manner sought by way of a declaration of the invalidity of an award of the Industrial Court for an error of law which does not go to jurisdiction would open the floodgates to extensive curial litigation in industrial disputes leading to uncertainty and confusion which the Act was expressly designed to preclude and prohibit. That is an important factor for consideration but if that were the only unfortunate consequence of a declaration of that nature and I were not otherwise precluded in law from doing so, I would have no compunction in exercising my discretion — an element in the granting of a declaratory judgment or order — to prevent injustice in any particular case and entertaining an application for a declaration of the nature sought in these proceedings, but, as I have already said repeatedly, the result of having two conflicting decisions outstanding in the same matter must necessarily deter the court from any such course.

I would only add that I am wholly in favour of extending the utility of the declaration as a formidable weapon in the armoury of judicial review and it may well be that its scope is somewhat restricted in its utilisation as of today. If, however, the result of any declaration would not entail a quashing of a decision as being *void ab initio*, then, I repeat, a declaration of invalidity would result in two inconsistent decisions in the same matter as the Industrial Court in this case would not be able to review or set aside its own award. I am of the view that even if a court were inclined intrepidly to follow *Taylor* v. *National Assistance Board, supra*, this aspect of the difficulty that would arise as a result would certainly be an essential consideration in the exercise of its discretion whether to grant a declaration, the declaratory judgment or order being a discretionary remedy.

I also raised the matter of the procedure adopted in applying for the declarations sought by way of originating summons. Mr. Puthucheary conceded that there was no question of construction involved and said he was only asking for a declaration of the applicant's rights, thereby admitting that the provisions of Order 54A rule 1 of the Rules of the High Court, 1957, do not apply. He agreed that the issue before me was purely a matter of law and that no rules provided for this form of application but submitted that a declaration by way of originating summons is generally available notwithstanding the rules and so long as the approach is correct and no rule prohibits that approach. I regret I cannot accept that submission.

Of all the Rules of the High Court, 1957, concerning declaratory relief, Order 25 rule 5 has the widest application as it provides that where a declaration is asked for, it may not be objected to on the ground that no consequential relief is or could be claimed. It does not prescribe any special procedure, nor is it limited to any specific matter. It applies to all proceedings for a declaration — whether instituted by writ or by originating summons, and whether brought under a particular statute or under the general declaratory jurisdiction of the court. Where no special procedure is laid down, the claim for a declaratory judgment is brought by way of a writ. In certain cases, however, specified by legislation, a declaration may be sought on originating summons. Proceedings in which the sole or principal question at issue is, or is likely to be, one of the construction of any written law or of any deed, will, contract or other document, are appropriate to be taken by originating summons. This is specifically provided for by Order 54A of the Rules of the High Court. The court may also make declarations by way of originating summons in matters relating to express trusts or the administration of the estates of deceased persons under the provisions of Order 55 rule 3 of the Rules of the High Court.

No declaration, in my view, can be applied for by way of originating motion save in such cases as have expressly been provided for by statute, for example, under the Companies Act. Indeed, the Federal Court had occasion to observe to this effect in *Philip Hoalim, Junior & Another* v. *State Commissioner, Penang*.[18]. The decision of the Privy Council in *Jaundoo* v. *Attorney-General of Guyana*[19] does not affect or alter the position in any way as it turned wholly on the construction of the very wide provisions of Article 19 of the Constitution of Guyana providing for redress and it must be remembered no declaration was sought in those proceedings. It is also possible to obtain a declaration in two other ways specified by the Rules, namely, on questions of law by stating a special case in any cause or matter under Order 34 rule 1 and in interpleader proceedings brought under Order 57.

It is true that the proceedings in *Taylor* v. *National Assistance Board, supra*, were by way of originating summons but then that case was for the determination of a question of the proper construction of section 4 of the Legal Aid and Advice Act, 1949. The proceedings in *In re Birkenhead Corporation, supra*, were also in the form of an originating summons but again this was to determine the rights of the plaintiff in that case on the true construction of certain resolutions passed by the Birkenhead Corporation. As Mr. Puthucheary has admitted that there is no question of construction here, obviously the provisions of Order 54A rule 1 cannot apply and the proceedings should in fact have been brought in the form of an action commenced by writ.

I further took the point of the nomenclature of Sungai Wangi Estate as applicant. It is clear that Sungai Wangi Estate is not a juristic entity and therefore can neither sue nor be sued. I was informed by Mr. Puthucheary that the employer involved in this dismissal of the respondent is in fact Golden Hope Plantations Limited. I do appreciate however that the wrong nomenclature of the applicant must be a perpetuation in these proceedings of the same error in the Industrial Court which again must of necessity have been the result of the reference and transmission of the respondent's complaint to the Industrial Court under the provisions of section 16A(9) of the Industrial Relations Act. The designation of the applicant as an Estate is faintly reminiscent of the ancient forms of action involving inanimate parties and suits pertaining to deodands but in any event this is a matter of minor relevance in these proceedings and does not in any way affect my decision.

I have come to the conclusion accordingly that I am unable to entertain these proceedings for a declaration in view of the inefficacy of the form and nature of the proceedings before me and of any declaration made pursuant thereto for the reasons I have stated.

The substance of the application to the effect that there is in fact an error of law on the face of the record of the Industrial Court Award No. 1/74 in Industrial Court Case No. 20 of 1973 was in fact argued before me. I appreciate that in view of the conclusions I have come to on the form and nature of the proceedings any decision on the substance of the application would be merely *obiter* but in deference to the arguments of counsel I shall deal with them but briefly.

The relevant facts adduced in evidence before the Industrial Court were that the Manager of Sungai Wangi Estate had received certain complaints against the respondent but that he did not in fact take them seriously until in view of one of the complainants shaving his head in protest he started asking questions, and as a result of his investigations in December, 1972, he thought it was time that he had it out with the respondent. Accordingly, he sent for the respondent who came to his office on 20th December, 1972. The gist of the Manager's evidence in this connection is that he told the respondent of the letters and other complaints he had received against him, all of which the respondent denied strongly, and as a result of being convinced that the respondent was innocent, the respondent's service was not affected and no action taken against him but he was in fact transferred to another post which the Manager said was a promotion. The transfer of the respondent was duly effected on 7th January, 1973, but upon receiving further complaints in respect of substantially the same matters as had come to his attention prior to 20th December, 1972, the Manager called for an enquiry on 18th January, 1973, when he heard a number of workers and thereafter decided to dismiss the respondent. On these primary facts which I have set out very briefly in view of the conclusions I have already come to on another aspect of this case, the Industrial Court found that there had in fact been condonation by the Estate of the complaints the respondent was called upon by the Manager to answer to on 20th December, 1972, at his office. The question that arises for determination is whether the Industrial Court was correct in law in finding condonation on the facts of the matter.

In *Angehrn & Piel* v. *Federal Cold Storage Co.*,[20] the Transvaal Supreme Court held that misconduct is deemed condoned where an election is made to retain an employee guilty of misconduct even if, at that time, the employee has falsely denied the misconduct, as long as the denial is known to be false, or the employer does not care whether it is true or not because the employee is too valuable to dismiss. In reversing the judgment in this case, sub. nom. *Federal Supply & Cold Storage Co.* v. *Angehrn*,[21] the Privy Council does not appear to have interfered with the foregoing proposition of law. Rather, it held on the facts that an employer will not be held to have condoned the misconduct of his employee because he believed the latter's denial and of the misconduct imputed to him, and continued him in employment without making further enquiries which would have disclosed the truth, but is justified in dismissing the employee at a later date when the true facts have come to light. Lord Atkinson in delivering the judgment of the Privy Council said (at page 152):

> "If the master accepts the servant's denial of guilt, and honestly comes to the conclusion that the servant is innocent, then, whatever the master's credulity, the case does not come within these authorities, since no man can condone a wrong which he does not believe was committed upon him."

I find that in the light of this pronouncement of the law on the doctrine of condonation of misconduct by the Privy Council and in view of the evidence of the Manager of the Estate which I have adverted to, there is in fact an error of law on the face of the record in the award of the Industrial Court.

For the reasons I have given however I am constrained to dismiss this application with costs.

Application dismissed.

Solicitors: *Skrine & Co.; Xavier & Vadiveloo.*